

Sep 26, 2018

SEAN F. MCAVOY, CLERK

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON**

KRISTIN F.,

Plaintiff,

vs.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No. 1:17-cv-00331-MKD

ORDER DENYING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AND GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

ECF Nos. 18, 22

BEFORE THE COURT are the parties' cross-motions for summary judgment. ECF Nos. 18, 22. The parties consented to proceed before a magistrate judge. ECF No. 7. The Court, having reviewed the administrative record and the parties' briefing, is fully informed. For the reasons discussed below, the Court denies Plaintiff's Motion, ECF No. 18, and grants Defendant's Motion, ECF No. 22.

1 F.3d 1104, 1111 (9th Cir. 2012). Further, a district court “may not reverse an
2 ALJ’s decision on account of an error that is harmless.” *Id.* An error is harmless
3 “where it is inconsequential to the [ALJ’s] ultimate nondisability determination.”
4 *Id.* at 1115 (quotation and citation omitted). The party appealing the ALJ’s
5 decision generally bears the burden of establishing that it was harmed. *Shinseki v.*
6 *Sanders*, 556 U.S. 396, 409-10 (2009).

7 **FIVE-STEP EVALUATION PROCESS**

8 A claimant must satisfy two conditions to be considered “disabled” within
9 the meaning of the Social Security Act. First, the claimant must be “unable to
10 engage in any substantial gainful activity by reason of any medically determinable
11 physical or mental impairment which can be expected to result in death or which
12 has lasted or can be expected to last for a continuous period of not less than twelve
13 months.” 42 U.S.C. §§ 423(d)(1)(A); 1382c(a)(3)(A). Second, the claimant’s
14 impairment must be “of such severity that [she] is not only unable to do [her]
15 previous work[,], but cannot, considering [her] age, education, and work
16 experience, engage in any other kind of substantial gainful work which exists in
17 the national economy.” 42 U.S.C. §§ 423(d)(2)(A); 1382c(a)(3)(B).

18 The Commissioner has established a five-step sequential analysis to
19 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §§
20 404.1520(a)(4)(i)-(v); 416.920(a)(4)(i)-(v). At step one, the Commissioner

1 considers the claimant's work activity. 20 C.F.R. §§ 404.1520(a)(4)(i);
2 416.920(a)(4)(i). If the claimant is engaged in "substantial gainful activity," the
3 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
4 404.1520(b); 416.920(b).

5 If the claimant is not engaged in substantial gainful activity, the analysis
6 proceeds to step two. At this step, the Commissioner considers the severity of the
7 claimant's impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii); 416.920(a)(4)(ii). If the
8 claimant suffers from "any impairment or combination of impairments which
9 significantly limits [his or her] physical or mental ability to do basic work
10 activities," the analysis proceeds to step three. 20 C.F.R. §§ 404.1520(c);
11 416.920(c). If the claimant's impairment does not satisfy this severity threshold,
12 however, the Commissioner must find that the claimant is not disabled. 20 C.F.R.
13 §§ 404.1520(c); 416.920(c).

14 At step three, the Commissioner compares the claimant's impairment to
15 severe impairments recognized by the Commissioner to be so severe as to preclude
16 a person from engaging in substantial gainful activity. 20 C.F.R. §§
17 404.1520(a)(4)(iii); 416.920(a)(4)(iii). If the impairment is as severe or more
18 severe than one of the enumerated impairments, the Commissioner must find the
19 claimant disabled and award benefits. 20 C.F.R. §§ 404.1520(d); 416.920(d).

1 If the severity of the claimant's impairment does not meet or exceed the
2 severity of the enumerated impairments, the Commissioner must pause to assess
3 the claimant's "residual functional capacity." Residual functional capacity (RFC),
4 defined generally as the claimant's ability to perform physical and mental work
5 activities on a sustained basis despite his or her limitations, 20 C.F.R. §§
6 404.1545(a)(1); 416.945(a)(1), is relevant to both the fourth and fifth steps of the
7 analysis.

8 At step four, the Commissioner considers whether, in view of the claimant's
9 RFC, the claimant is capable of performing work that he or she has performed in
10 the past (past relevant work). 20 C.F.R. §§ 404.1520(a)(4)(iv); 416.920(a)(4)(iv).
11 If the claimant is capable of performing past relevant work, the Commissioner
12 must find that the claimant is not disabled. 20 C.F.R. §§ 404.1520(f); 416.920(f).
13 If the claimant is incapable of performing such work, the analysis proceeds to step
14 five.

15 At step five, the Commissioner considers whether, in view of the claimant's
16 RFC, the claimant is capable of performing other work in the national economy.
17 20 C.F.R. §§ 404.1520(a)(4)(v); 416.920(a)(4)(v). In making this determination,
18 the Commissioner must also consider vocational factors such as the claimant's age,
19 education and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v);
20 416.920(a)(4)(v). If the claimant is capable of adjusting to other work, the

1 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
2 404.1520(g)(1); 416.920(g)(1). If the claimant is not capable of adjusting to other
3 work, analysis concludes with a finding that the claimant is disabled and is
4 therefore entitled to benefits. 20 C.F.R. §§ 404.1520(g)(1); 416.920(g)(1).

5 The claimant bears the burden of proof at steps one through four above.
6 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to
7 step five, the burden shifts to the Commissioner to establish that (1) the claimant is
8 capable of performing other work; and (2) such work “exists in significant
9 numbers in the national economy.” 20 C.F.R. §§ 404.1560(c)(2); 416.960(c)(2);
10 *Beltran v. Astrue*, 700 F.3d 386, 389 (9th Cir. 2012).

11 **ALJ’S FINDINGS**

12 Plaintiff applied for disability insurance benefits on February 7, 2014 and
13 supplemental security income benefits on June 3, 2014, alleging disability
14 beginning December 14, 2013. Tr. 243-50. Benefits were denied initially,¹ Tr.

15 _____
16 ¹ On September 17, 2014, Diane Fligstein, Ph.D. prepared a mental RFC for
17 Disability Determination Services finding Plaintiff markedly limited in her ability
18 to complete a normal workday and workweek without interruptions from
19 psychologically based symptoms. Tr. 128-29; Tr. 145-46. This resulted in a
20 proposed finding of disability. Tr. 133, 150. Subsequently, the San Francisco

1 181-87, and upon reconsideration. Tr. 190-94. Plaintiff appeared for a hearing
2 before an administrative law judge (ALJ) on September 1, 2016. Tr. 41-87. On
3 September 28, 2016, the ALJ denied Plaintiff's applications. Tr. 18-40.

4 At step one, the ALJ found Plaintiff had not engaged in substantial gainful
5 activity since December 14, 2013, the alleged onset date. Tr. 23. At step two, the
6 ALJ found Plaintiff has the following severe impairments: major depressive
7 disorder; generalized anxiety disorder; polyarthralgias; and obesity. Tr. 23. At
8 step three, the ALJ found that Plaintiff does not have an impairment or
9 combination of impairments that meets or medically equals the severity of a listed
10 impairment. Tr. 24. The ALJ then concluded that Plaintiff has the RFC to perform
11 light work with the following additional limitations:

12 [S]he cannot climb ladders, ropes, and scaffolds, and can frequently perform
13 all other postural activities; she can have only occasional exposure to
14 vibration and pulmonary irritants; she can have no exposure to hazards, such
15 as unprotected heights and moving mechanical parts; she can tolerate only
16 moderate noise levels; she is limited to simple, routine, and repetitive tasks
17 with a reasoning level of two or less; she needs a routine, predictable work
18 environment that requires no more than simple decision-making; and she can
19 have only occasional contact with the public, coworkers, and supervisors.

20 Disability Quality Branch issued a Request for Corrective Action finding the initial
21 mental RFC flawed and directing issuance of a new disability determination
22 explanation denying benefits. Tr. 263-65.

Tr. 26.

At step four, the ALJ found Plaintiff was unable to perform her past relevant work as a childcare provider. Tr. 32. At step five, the ALJ found that considering Plaintiff's age, education, work experience, and RFC, there are other jobs that exist in significant numbers in the national economy that the Plaintiff can perform such as photocopy machine operator, marker, and cardboard inserter. Tr. 33. The ALJ concluded Plaintiff has not been under a disability, as defined in the Social Security Act, from December 14, 2013 through the date of the decision. Tr. 34.

On July 27, 2017, the Appeals Council denied review, Tr. 1-7, making the ALJ's decision the Commissioner's final decision for purposes of judicial review. *See* 42 U.S.C. § 1383(c)(3); 20 C.F.R. §§ 416.1481, 422.210.

ISSUES

Plaintiff seeks judicial review of the Commissioner's final decision denying her disability insurance benefits under Title II and supplemental security income benefits under Title XVI of the Social Security Act. ECF No. 18. Plaintiff raises the following issues for this Court's review:

1. Whether the ALJ properly weighed Plaintiff's symptom claims;
2. Whether the ALJ properly evaluated the medical opinion evidence;
3. Whether the ALJ properly considered the lay witness statements; and

1 4. Whether the ALJ properly found at step five that Plaintiff could perform
2 other work in the national economy.

3 *See* ECF No. 18 at 9-18.

4 **DISCUSSION**

5 **A. Plaintiff's Symptom Claims**

6 Plaintiff faults the ALJ for discrediting Plaintiff's symptom testimony. ECF
7 No. 18 at 15-18.

8 An ALJ engages in a two-step analysis when evaluating a claimant's
9 subjective symptoms. 20 C.F.R. §§ 404.1529(a), 416.929(a); Social Security
10 Ruling (SSR) 16-3p, 2016 WL 1119029, at *2. "First, the ALJ must determine
11 whether there is objective medical evidence of an underlying impairment which
12 could reasonably be expected to produce the pain or other symptoms alleged."
13 *Molina*, 674 F.3d at 1112 (internal quotation marks omitted). "The claimant is not
14 required to show that her impairment could reasonably be expected to cause the
15 severity of the symptom she has alleged; she need only show that it could
16 reasonably have caused some degree of the symptom." *Vasquez v. Astrue*, 572
17 F.3d 586, 591 (9th Cir. 2009) (internal quotation marks omitted).

18 Second, "[i]f the claimant meets the first test and there is no evidence of
19 malingering, the ALJ can only reject the claimant's testimony about the severity of
20 the symptoms if [the ALJ] gives 'specific, clear and convincing reasons' for the
rejection." *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (internal

1 citations and quotations omitted). “General findings are insufficient; rather, the
2 ALJ must identify what testimony is not credible and what evidence undermines
3 the claimant’s complaints.” *Id.* (quoting *Lester v. Chater*, 81 F.3d 821, 834 (9th
4 Cir. 1995)); *Thomas*, 278 F.3d at 958 (“[T]he ALJ must make a credibility
5 determination with findings sufficiently specific to permit the court to conclude
6 that the ALJ did not arbitrarily discredit claimant’s testimony.”)). “The clear and
7 convincing [evidence] standard is the most demanding required in Social Security
8 cases.” *Garrison v. Colvin*, 759 F.3d 995, 1015 (9th Cir. 2014) (quoting *Moore v.*
9 *Comm’r of Soc. Sec. Admin.*, 278 F.3d 920, 924 (9th Cir. 2002).

10 Factors to be considered in evaluating the intensity, persistence, and limiting
11 effects of an individual’s symptoms include: (1) daily activities; (2) the location,
12 duration, frequency, and intensity of pain or other symptoms; (3) factors that
13 precipitate and aggravate the symptoms; (4) the type, dosage, effectiveness, and
14 side effects of any medication an individual takes or has taken to alleviate pain or
15 other symptoms; (5) treatment, other than medication, an individual receives or has
16 received for relief of pain or other symptoms; (6) any measures other than
17 treatment an individual uses or has used to relieve pain or other symptoms; and (7)
18 any other factors concerning an individual’s functional limitations and restrictions
19 due to pain or other symptoms. SSR 16-3p, 2016 WL 1119029, at *7; 20 C.F.R.
20 §§ 404.1529(c) (1)–(3), 416.929 (c) (1)–(3). The ALJ is instructed to “consider all

1 of the evidence in an individual's record," "to determine how symptoms limit
2 ability to perform work-related activities." *Id.* at *2.

3 Here, the ALJ found Plaintiff's medically determinable impairments could
4 reasonably be expected to produce the symptoms, but Plaintiff's statements
5 concerning the intensity, persistence and limiting effects of these symptoms were
6 not consistent with the medical evidence and other evidence in the record. Tr. 27.

7 *1. Credited Symptom Claims*

8 Not all of Plaintiff's symptom claims were rejected by the ALJ. The ALJ
9 observed that he credited certain functional limitations which were accommodated
10 in the RFC. Tr. 28. Specifically, although Plaintiff alleged she was unable to
11 sustain attendance in a work environment, the ALJ noted this allegation was based
12 on her inability to complete cosmetology school and anxiety. Tr. 27. As Plaintiff
13 identified intensive social interaction and academic testing as primary reasons she
14 was unable to sustain attendance, the ALJ incorporated limitations in social
15 functioning and concentration into the RFC. Tr. 26. The ALJ commented that
16 cosmetology school was "a far more demanding undertaking" than the simple,
17 routine work consistent with the RFC would entail. Tr. 27.

18 Plaintiff contends the ALJ's comment is "speculation not supported by the
19 evidence" and the pressures of "performing and failing" would be the same in both
20 contexts. ECF No. 18 at 17. The ALJ may make reasonable inferences drawn

1 from the record. *Batson v. Comm’r Soc. Sec. Admin.*, 359 F.3d 1190, 1193 (9th
2 Cir. 2004) (“[T]he Commissioner’s findings are upheld if supported by inferences
3 reasonably drawn from the record.”). Plaintiff’s testimony and complaints to
4 medical providers did not indicate the “pressure of performing” contributed to
5 absences from school. *See* Tr. 65 (“I just got a lot of anxiety being around all the
6 people all the time. . . . It was more the learning. I didn’t do well at first. . . . So, I
7 just never really felt like I could do it. . . . When a test would come up . . . I’d have
8 anxiety. I wouldn’t even be able to handle going.”); Tr. 490 (“I was so horribly
9 depressed and I can’t go in without crying. I can’t tolerate drama and there was a
10 lot of drama.”); Tr. 493 (she felt unable “to tolerate the interpersonal and cognitive
11 demands of the classes.”); Tr. 585 (“She develops severe fatigue after cutting the
12 hair of 3-4 clients and is not able to put in a full day’s work because of above
13 symptoms.”). The record supports the ALJ’s reasonable interpretation of
14 Plaintiff’s credited testimony regarding symptoms contributing to her absenteeism
15 in cosmetology school.

16 *2. Improvement with Treatment*

17 The ALJ discounted Plaintiff’s other symptoms claim finding Plaintiff’s
18 symptoms improved with treatment, which the ALJ concluded called into question
19 the reliability of Plaintiff’s alleged disabling limitations. Tr. 27. The effectiveness
20 of medication and treatment is a relevant factor in determining the severity of a

1 claimant's symptoms. 20 C.F.R. §§ 404.1529(c)(3), 416.929(c)(3) (2011); *see*
2 *Warre v. Comm'r of Soc. Sec. Admin.*, 439 F.3d 1001, 1006 (9th Cir. 2006)
3 (conditions effectively controlled with medication are not disabling for purposes of
4 determining eligibility for benefits) (internal citations omitted); *see also*
5 *Tommasetti v. Astrue*, 533 F.3d 1035, 1040 (9th Cir. 2008) (a favorable response to
6 treatment can undermine a claimant's complaints of debilitating pain or other
7 severe limitations).

8 The ALJ noted that that during a routine appointment in March 2015, it was
9 reported "[m]edications definitely improve her mental functioning and also help
10 reduce depression." Tr. 28 (quoting Tr. 545). Subsequently, in a January 2016
11 treatment note, it indicated Plaintiff's depression was "well controlled with
12 medication" despite some symptoms of fatigue. Tr. 28 (quoting Tr. 556). Plaintiff
13 contends the "symptom-free" periods relied upon the ALJ do not reflect the record
14 showing a pattern that "her depression always returned." ECF No. 18 at 10 (citing
15 Tr. 545, 556, 560-61, 566). However, a review of the record reflects that when
16 Plaintiff's symptoms of depression or anxiety returned or worsened, Plaintiff asked
17 for and responded well to prescription adjustments. *See* Tr. 440 (June 2013:
18 adding Effexor after Plaintiff asks for something other than Wellbutrin); Tr.459
19 (Jan. 2014: increasing Effexor dosage from 75 to 150 mg after Plaintiff asks
20 provider whether to take something different or add another medication); Tr. 561

1 (June 2016: increasing Effexor dosage to 225 mg). Even if Plaintiff can identify
2 evidence that can be interpreted more favorably to Plaintiff's position, the evidence
3 is susceptible to more than one rational interpretation, and therefore the ALJ's
4 ultimate conclusion must be upheld. *See Burch v. Barnhart*, 400 F.3d 676, 679
5 (9th Cir. 2005). Substantial evidence supports the ALJ's reasonable interpretation
6 of the evidence. That Plaintiff's mental health symptoms improved with treatment
7 was a clear and convincing reason to discount Plaintiff's symptom testimony.

8 *3. Minimal and Conservative Treatment*

9 The ALJ found Plaintiff's statements regarding her symptoms were
10 inconsistent with the minimal mental health treatment in the record. Tr. 28. The
11 medical treatment a Plaintiff seeks to relieve her symptoms is a relevant factor in
12 evaluating the intensity and persistence of symptoms. 20 C.F.R. §§
13 416.929(c)(3)(iv), (v). When a claimant receives only conservative or minimal
14 treatment, it supports an adverse inference as to the claimant's credibility regarding
15 the severity of her subjective symptoms. *Parra v. Astrue*, 481 F.3d 742, 750-51
16 (9th Cir. 2007); *Meanal v. Apfel*, 172 F.3d 1111, 1114 (9th Cir. 1999). Moreover,
17 noncompliance with medical care or unexplained or inadequately explained
18 reasons for failing to seek medical treatment cast doubt on a claimant's subjective
19 complaints. *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989); *Macri v. Chater*, 93
20 F.3d 540, 544 (9th Cir. 1996). Where the evidence suggests lack of mental health

1 treatment is part of a claimant's mental health condition, it may be inappropriate to
2 consider a claimant's lack of mental health treatment as evidence of a lack of
3 credibility. *See Nguyen v. Chater*, 100 F.3d 1462, 1465 (9th Cir. 1996). However,
4 when there is no evidence suggesting a failure to seek treatment is attributable to a
5 mental impairment rather than personal preference, it is reasonable for the ALJ to
6 conclude that the level or frequency of treatment is inconsistent with the alleged
7 severity of complaints. *Molina*, 674 F.3d at 1113-14.

8 Though Plaintiff received mental health treatment in the form of medication,
9 the ALJ observed the record contained very few counseling records. Tr. 28.
10 Plaintiff had reported experiencing benefit from counseling in the past. Tr. 28; *see*
11 Tr. 493 (Plaintiff "has felt that long term counseling has largely kept her 'on
12 track.'"). In 2014, Plaintiff asked her medical provider about counseling and she
13 was provided the name of a counselor. Tr. 463. However, the record contains only
14 a single counseling record pertaining to treatment during the relevant period. Tr.
15 586-88 (Plaintiff's March 23, 2015 visit with therapist Diane Thompson); *see* Tr.
16 589 (letter from Lisa Burnell pertaining to mental health treatment in 2010 and
17 2011). Though Plaintiff apparently attended several other sessions with Ms.
18 Thompson, more extensive records were not available from Ms. Thompson, in
19 part, due to Plaintiff having missed or cancelled nine appointments within a one-

1 month timeframe. Tr. 367. The ALJ noted that the majority of treatment records
2 did not involve mental health complaints. Tr. 28.

3 Plaintiff does not challenge the ALJ's finding that Plaintiff did not obtain
4 extensive mental health treatment, but claims this is a direct symptom of her
5 mental health impairments. ECF No. 18 at 17. The ALJ inquired into the reason
6 for lack of treatment and Plaintiff attributed her failure to seek treatment to
7 anxiety. Tr. 75. The fact that she did not continue to seek mental health treatment,
8 despite the recommendations of her providers and her ability to do so, supports the
9 ALJ's conclusions regarding Plaintiff's assertion of disabling symptoms of
10 depression and anxiety. Alternatively, even if the failure to pursue mental health
11 treatment was related to the Plaintiff's depression and anxiety and this alone would
12 be insufficient to sustain the ALJ's adverse finding, any error is harmless because
13 it does not invalidate the overall analysis of Plaintiff's symptoms. *See, e.g.,*
14 *Batson*, 359 F.3d at 1197 (upholding ALJ's credibility determination even though
15 one reason may have been in error).

16 *4. Lack of Supporting Medical Evidence*

17 The ALJ found the limitations reported by Plaintiff were not consistent with
18 disabling functional limitations or supported by the medical evidence. Tr. 28. An
19 ALJ may not discredit a claimant's symptom testimony and deny benefits solely
20 because the degree of the symptoms alleged is not supported by objective medical

1 evidence. *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001); *Bunnell v.*
2 *Sullivan*, 947 F.2d 341, 346-47 (9th Cir. 1991); *Fair*, 885 F.2d at 601. However,
3 the medical evidence is a relevant factor in determining the severity of a claimant's
4 pain and its disabling effects. *Rollins*, 261 F.3d at 857; 20 C.F.R. §§
5 404.1529(c)(2); 416.929(c)(2). Minimal objective evidence is a factor which may
6 be relied upon in discrediting a claimant's testimony, although it may not be the
7 only factor. *See Burch*, 400 F.3d at 680.

8 In regards to Plaintiff's mental health complaints, the ALJ noted that
9 Plaintiff's "candid presentation to treating sources" demonstrated "very few
10 instances of mental health complaints, aside from occasional anxiety." Tr. 28. The
11 record supports the ALJ's conclusion. Plaintiff routinely sought medical care
12 during the relevant period, but only occasionally noted mental health complaints.
13 When Plaintiff sought treatment, the ALJ observed that her records often reflected
14 frequent normal findings. Tr. 28. For example, Dr. Brown's treatment record
15 often reported Plaintiff "alert with normal mood and affect." Tr. 28 (citing Tr.
16 544, 547, 552, 568). The ALJ also noted that the two counseling records were not
17 consistent with disabling functional limitations. Tr. 28 (citing Tr. 586-89).
18 Likewise, the ALJ concluded the objective findings showing full range of motion
19 and normal gait, belied the severity of Plaintiff's alleged physical limitations, Tr.

1 28, a finding Plaintiff does not contest.² There is substantial evidence to support
2 the ALJ's conclusion that there were minimal complaints and minimal treatment
3 records supporting Plaintiff's allegation of disabling symptoms.

4 In summary, the ALJ provided a number of specific, clear, and convincing
5 reasons for not fully crediting Plaintiff's symptom claims.

6 **B. Medical Opinion Evidence**

7 Plaintiff contends the ALJ improperly weighed the medical opinions of
8

9 ² Defendant's Motion responds only to the issues raised regarding Plaintiff's
10 psychological complaints because Plaintiff does not specifically challenge the
11 physical RFC. ECF No. 22 at 3. The Court notes that Plaintiff generally contends
12 that had the ALJ credited Plaintiff's symptom claims, the ALJ should have found
13 Plaintiff "more limited from physical and psychological perspective, and unable to
14 work." ECF No. 18 at 18. Given Plaintiff's failure to specifically and distinctly
15 argue error related to the evaluation of Plaintiff's physical RFC, any challenge to
16 that issue is waived. *See Carmickle v. Comm'r, Soc. Sec. Admin.*, 533 F.3d 1155,
17 1161 n.2 (9th Cir. 2008) (determining Court may decline to address on the merits
18 issues not argued with specificity); *Kim v. Kang*, 154 F.3d 996, 1000 (9th Cir.
19 1998) (the Court may not consider on appeal issues not "specifically and distinctly
20 argued" in the party's opening brief).

1 examining doctors Frank Rosekrans, Ph.D., Elizabeth Koenig, M.D., and John
2 Arnold, Ph.D., as well as treating physician, William R. Brown, M.D. ECF No. 18
3 at 5-9.

4 There are three types of physicians: “(1) those who treat the claimant
5 (treating physicians); (2) those who examine but do not treat the claimant
6 (examining physicians); and (3) those who neither examine nor treat the claimant
7 but who review the claimant’s file (nonexamining or reviewing physicians).”
8 *Holohan v. Massanari*, 246 F.3d 1195, 1201-02 (9th Cir. 2001) (brackets omitted).
9 “Generally, a treating physician’s opinion carries more weight than an examining
10 physician’s, and an examining physician’s opinion carries more weight than a
11 reviewing physician’s.” *Id.* “In addition, the regulations give more weight to
12 opinions that are explained than to those that are not, and to the opinions of
13 specialists concerning matters relating to their specialty over that of
14 nonspecialists.” *Id.* (citations omitted).

15 If a treating or examining physician’s opinion is uncontradicted, an ALJ may
16 reject it only by offering “clear and convincing reasons that are supported by
17 substantial evidence.” *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).
18 “However, the ALJ need not accept the opinion of any physician, including a
19 treating physician, if that opinion is brief, conclusory and inadequately supported
20 by clinical findings.” *Bray v. Comm’r Soc. Sec. Admin.*, 554 F.3d 1219, 1228 (9th

1 Cir. 2009) (internal quotation marks and brackets omitted). “If a treating or
2 examining doctor’s opinion is contradicted by another doctor’s opinion, an ALJ
3 may only reject it by providing specific and legitimate reasons that are supported
4 by substantial evidence.” *Bayliss*, 427 F.3d at 1216 (citing *Lester*, 81 F.3d at 830-
5 31).

6 To the extent that Drs. Rosekrans, Koenig, Arnold, and Brown assessed
7 Plaintiff with limitations that would prevent her from working, these opinions are
8 contradicted by the credited opinions of the state agency reviewing physicians,
9 Bruce Eather, Ph.D., Tr. 90-117, Christmas Covell, Ph.D., Tr. 161-63, 175-77,
10 Howard Platter, Tr. 160-61, 174-75, and testifying medical expert Glenn Griffin,
11 Ph.D, Tr. 55-64. Therefore, the ALJ was required to provide specific and
12 legitimate reasons for rejecting their opinions. *Bayliss*, 427 F.3d at 1216.

13 *1. Frank Rosekrans, Ph.D. (Nov. 2013)*

14 Dr. Rosekrans evaluated Plaintiff on November 5, 2013 and diagnosed
15 major depressive disorder (single episode moderate), somatization disorder, and a
16 GAF score of 45. Tr. 412-20. He opined Plaintiff had marked limitations in the
17 abilities to: (i) perform activities within a schedule, maintain regular attendance,
18 and be punctual within customary tolerances without special supervision; (ii)
19 communicate and perform effectively in a work setting; (iii) complete a normal
20 work day and work week without interruptions from psychologically based

1 symptoms, and (iv) maintain appropriate behavior in a work setting. The ALJ
2 assigned little weight to Dr. Rosekrans' opinion.

3 First, the ALJ found Dr. Rosekrans did not review any outside treatment
4 records and formed his opinions based upon Plaintiff's self-reported symptoms.
5 Tr. 28. The extent to which a medical source is "familiar with the other
6 information in [the claimant's] case record" is relevant in assessing the weight of
7 that source's medical opinion. *See* 20 C.F.R. §§ 404.1527(c)(6), 416.927(c)(6).
8 Here, the ALJ credited the opinions of state reviewing psychologists, Dr. Eather
9 and Dr. Covell, and the medical expert, Dr. Griffin, all of whom had reviewed the
10 medical evidence available to them. *See* Tr. 90-117 (Oct. 2014 disability
11 determination explanations listing evidence reviewed by Dr. Eather); Tr. 153-80
12 (Dec. 2014 disability determination explanations listing evidence reviewed by Dr.
13 Covell); Tr. 55 (testimony indicating Dr. Griffin reviewed Exhibits 1F through
14 16F); Tr. 30 (ALJ finding Drs. Eather and Covell's opinions consistent with the
15 longitudinal record); Tr. 31 (ALJ finding Dr. Griffin's opinion consistent with his
16 review of the medical evidence). It was reasonable for the ALJ to consider the
17 medical source's familiarity with and reliance on the medical record in evaluation
18 his opinions. Plaintiff does not challenge this reason, thus it is waived. *See*
19 *Carmickle*, 533 F.3d at 1161 n.2 (court may decline to address an issue not raised
20 with specificity in Plaintiff's briefing).

1 Moreover, a physician's opinion may be rejected if it is based on a
2 claimant's subjective complaints which were properly discounted. *Tonapetyan v.*
3 *Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001); *Morgan v. Comm'r of Soc. Sec.*
4 *Admin.*, 169 F.3d 595, 602 (9th Cir. 1999); *Fair*, 885 F.2d at 604. "[W]hen an
5 opinion is not more heavily based on a patient's self-reports than on clinical
6 observations, [this] is no evidentiary basis for rejecting the opinion." *Ghanim*, 763
7 F.3d at 1162. Here, Dr. Rosekrans conducted a clinical interview that was based
8 entirely on Plaintiff's self-reports. Though Dr. Rosekrans also performed a mental
9 status examination, he relied upon Plaintiff's responses. Plaintiff does not
10 challenge this reason, thus it is waived. *See Carmickle*, 533 F.3d at 1161 n.2 (court
11 may decline to address an issue not raised with specificity in Plaintiff's briefing).
12 As Dr. Rosekrans' opinion appears largely based on the symptoms Plaintiff
13 reported, which the ALJ properly discounted, this was a specific and legitimate
14 reason to accord Dr. Rosekrans' opinion less weight.

15 Next, the ALJ found Dr. Rosekrans' opinion was not supported by his own
16 examination findings. Tr. 29. A medical opinion may be rejected by the ALJ if it
17 is conclusory, contains inconsistencies, or is inadequately supported. *Bray*, 554
18 F.3d at 1228; *Thomas*, 278 F.3d at 957. Moreover, a physician's opinion may be
19 rejected if it is unsupported by the physician's treatment notes. *See Connett v.*
20 *Barnhart*, 340 F.3d 871, 875 (9th Cir. 2003). The ALJ found Dr. Rosekrans'

1 opinion inconsistent with Plaintiff's "unremarkable presentation and mental
2 status." Tr. 29. Dr. Rosekrans observed Plaintiff was nicely dressed and groomed;
3 Plaintiff's speech was normal, not overly rapid or slow; Plaintiff "did not appear
4 anxious defensive, angry or sullen"; Plaintiff maintained appropriate eye contact
5 and cooperated during the evaluation; Plaintiff had "no signs of profound
6 depression"; Plaintiff was able to go to public spaces without excessive anxiety;
7 Plaintiff's emotions did not seem "labile or excitable, nor did they seem flat or
8 overly subdued"; and finally, Plaintiff's thought process, concentration, insight,
9 and judgment were all within normal limits. Tr. 415-16. Plaintiff's contention that
10 Dr. Rosekrans' opinion was "not inconsistent with Ms. Franco's presentation,"
11 does not address the internal inconsistencies cited by the ALJ. ECF No. 18 at 11.
12 The inconsistency between Dr. Rosekrans' observations and the limitations he
13 assessed constitutes a specific and legitimate reason for rejecting his opinion.
14 *Bayliss*, 427 F.3d at 1216.

15 Finally, the ALJ found Dr. Rosekrans' opinion was inconsistent "with the
16 remainder of the record." Tr. 29. An ALJ may discredit physicians' opinions that
17 are unsupported by the record as a whole. *Batson*, 359 F.3d at 1195. Moreover,
18 the extent to which a medical source is "familiar with the other information in [the
19 claimant's] case record" is relevant in assessing the weight of that source's medical
20 opinion. *See* 20 C.F.R. § 416.927(c)(6). The ALJ noted inconsistencies with

1 Plaintiff's routine treatment records from Plaintiff's primary care physician, Dr.
2 Brown. Tr. 29. Dr. Griffin opined that all three one-time evaluations in the record
3 (of Drs. Rosekrans, Koenig, and Arnold) were inconsistent with Dr. Brown's
4 treatment record which contained very little about Plaintiff's psychiatric
5 complaints. Tr. 59-60. The ALJ also noted inconsistency with the credited portion
6 of Dr. Koenig's opinion indicating Plaintiff was capable of perform simple tasks.
7 Tr. 29. Dr. Rosekrans' opinion was also contradicted by the mild to moderate
8 limitations assessed by three non-examining doctors' opinions, including medical
9 expert Dr. Griffin, who reviewed the longitudinal record. *See Andrews v. Shalala*,
10 53 F.3d 1035, 1041 (9th Cir. 1995) (explaining that non-examining source's report
11 may serve as substantial evidence and may be used to reject an examining
12 physician's opinion, if it is consistent with and supported by other evidence in the
13 record).

14 Plaintiff contends that Dr. Rosekrans' opinion was consistent other part of
15 the record, ECF No. 18 at 11, however, this does not warrant a reversal or remand
16 of the ALJ's decision because it amounts to no more than a dispute about the
17 ALJ's interpretation of the evidence. It is well established that the ALJ is
18 responsible for resolving conflicts in medical testimony. *Magallanes v. Bowen*,
19 881 F.2d 747, 750 (9th Cir. 1989). Moreover, an ALJ may choose to give more
20 weight to an opinion that is more consistent with the evidence in the record. 20

1 C.F.R. § 416.927(c)(4) (“the more consistent an opinion is with the record as a
2 whole, the more weight we will give to that opinion”). “Where evidence is
3 susceptible to more than one rational interpretation, it is the ALJ’s conclusion that
4 must be upheld.” *Burch*, 400 F.3d at 679.

5 The ALJ identified specific and legitimate reasons supported by substantial
6 evidence for according little weight to Dr. Rosekrans’ opinion.

7 *2. Elizabeth Koenig, M.D. (Aug. 2014)*

8 Dr. Koenig performed a psychiatric interview and consultative examination
9 at the request of the Department of Disability Determination Services on August
10 31, 2014. Tr. 487-94. The only record she had available for review was the
11 evaluation of Dr. Rosekrans. Tr. 486-87. Though she noted the existence of
12 “diagnostic ambiguities,” Tr. 494, Dr. Koenig diagnosed: major depressive
13 disorder, recurrent (rule out bipolar II disorder, currently depressed, moderate-to-
14 severe without psychotic symptoms); attention deficit hyperactivity disorder,
15 combined type, provisional; anxiety disorder, NOS, with panic and generalized
16 anxiety, perhaps some PTSD symptoms; rule out of alcohol abuse in sustained full
17 remission; and rule out personality disorder, not otherwise specified, with cluster B
18 traits (particularly borderline) and perhaps schizotypal traits. Tr. 493. Dr. Koenig
19 assessed a GAF score of 62. Dr. Koenig opined Plaintiff could perform simple
20 tasks well, but would have difficulty with tasks requiring more sustained

1 concentration (including math) or multiple step commands. Tr. 494. Dr. Koenig
2 further opined that without stabilization of her mood and anxiety, she is “likely to
3 have difficulty with regular attendance at work as she has been having with her
4 classes.” Tr. 494. She also opined Plaintiff’s lability and rapid speech “may”
5 interfere with effective communication. *Id.*

6 The ALJ accorded significant weight to the portion of Dr. Koenig’s opinion
7 suggesting Plaintiff could perform simple tasks and the GAF score assessment. Tr.
8 29. The ALJ accorded little weight to the remainder of her opinion citing three
9 reasons. *Id.*

10 First, the ALJ found Dr. Koenig’s opinion inconsistent with the treatment
11 record of Plaintiff’s primary treating physician, Dr. Brown. Tr. 29. An ALJ may
12 reject a physician’s findings that are unsupported by the record as a whole or by
13 objective medical findings. *Batson*, 359 F.3d at 1195. The ALJ noted Plaintiff’s
14 “candid presentation with Dr. Brown “showed no significant mental symptoms or
15 communications deficits.” Tr. 29. The ALJ referred to Dr. Brown’s nearly
16 contemporaneous treatment record from August 11, 2014, just twenty days prior to
17 the evaluation with Dr. Koenig on August 31, 2014. At Plaintiff’s August 11
18 appointment with Dr. Brown, Plaintiff presented with primary complaints of left
19 otalgia and “associated fatigue,” left hip pain, and headaches. Tr. 541, 543
20 (endorsing depression and anxiety in Dr. Brown’s review of systems). The ALJ

1 found it notable that just days later, Dr. Koenig opined that Plaintiff's "degree of
2 depression and distress with which she presents," would likely result in Plaintiff
3 having attendance difficulties at work as she has had with her cosmetology classes.
4 Tr. 494. In yet another example, Dr. Brown noted Plaintiff was "communicative"
5 with a normal affect, Tr. 544, meanwhile Dr. Koenig opined rapid speech might
6 interfere with effective communication, Tr. 494. These inconsistencies with the
7 contemporaneous treatment record provided a specific and legitimate reason to
8 accord less weight to Dr. Koenig's opinion that Plaintiff would likely have
9 attendance and communication difficulties.

10 Second, the ALJ found Dr. Koenig's opinion was internally inconsistent
11 with the assessed GAF score of 62, which the ALJ found was "indicative of an
12 individual with some mild symptoms or some difficulty in social or occupational
13 functioning, but generally functioning pretty well." Tr. 29. An ALJ may reject
14 opinions that are internally inconsistent. *Nguyen*, 100 F.3d at 1464. An ALJ is not
15 obliged to credit medical opinions that are unsupported by the medical source's
16 own data and/or contradicted by the opinions of other examining medical sources.
17 *Tommasetti*, 533 F.3d at 1041. As noted by the Ninth Circuit, "a GAF score is
18 merely a rough estimate of an individual psychological, social, or occupational
19 functioning used to reflect an individual's need for treatment, [] it does not have
20 any direct correlate of work-related or functional limitations." *Hughes v. Coleman*,

1 599 Fed. Appx. 765, 766 (9th Cir. April 15, 2015) (unpublished opinion) (citation
2 omitted). Plaintiff does not address this reason, ECF No. 18 at 12-13, thus it is
3 waived. *See Carmickle*, 533 F.3d at 1161 n.2 (court may decline to address an
4 issue not raised with specificity in Plaintiff's briefing). Even if the Court were to
5 consider the issue, because the ALJ offered other specific and legitimate reasons to
6 discount Dr. Koenig's opinion, any potential error in consideration of the GAF
7 score is inconsequential to this overall disability determination and is therefore
8 harmless. *See Stout v. Comm'r of Soc. Sec. Admin.*, 454 F.3d 1050, 1055 (9th Cir.
9 2006).

10 Finally, the ALJ rejected Dr. Koenig's opinion that Plaintiff's struggle with
11 attendance in cosmetology school was an indicator Plaintiff would likely struggle
12 with attendance at work. Tr. 29. The ALJ's findings are upheld if they are
13 supported by inferences reasonably drawn from the record. *See Molina*, 674 F.3d
14 at 1111. Plaintiff was self-employed as a fulltime child care provider for many
15 years leading up to her alleged date of onset. Tr. 271. Plaintiff then nearly
16 completed cosmetology school, despite the demands and attendance problems. Dr.
17 Griffin testified that the ability to maintain regular attendance at work would
18 depend on the "nature and demand of the work," and that Dr. Koenig's concern
19 about attendance was not made in reference to "any specific set of work demands
20 or work conditions." Tr. 63. As discussed *supra*, based on this record, it was

1 reasonable for the ALJ to conclude the demands of cosmetology school were
2 greater than the simple work contemplated by the RFC, and to reject the contention
3 Plaintiff's absenteeism at school correlates to her ability to complete a typical work
4 day or work week. Accordingly, the ALJ was entitled and did here reasonably
5 reject Dr. Koenig's opinion regarding absenteeism by providing specific and
6 legitimate reasons in support of his conclusion.

7 *3. John Arnold, Ph.D. (Sept. 2015)*

8 On September 28, 2015, Dr. Arnold completed a psychological evaluation
9 diagnosing Plaintiff with persistent depressive disorder, late onset; generalized
10 anxiety disorder; rule out somatic symptom disorder; attention deficit disorder; and
11 borderline and dependent personality features, rule out disorder. Tr. 536-40. Dr.
12 Arnold assessed marked limitations in the abilities to: (i) adapt to changes in a
13 routine work setting; (ii) be aware of normal hazards and take appropriate
14 precautions; and (iii) complete a normal work day and work week without
15 interruptions from psychologically based symptoms. Dr. Arnold recommended
16 stable housing, medical care and psychiatric services/counseling. Tr. 539. The
17 ALJ accorded little weight to Dr. Arnold's assessment. Tr. 30.

18 First, the ALJ rejected Dr. Arnold's opinion because it was "cursory" and
19 provided in a check-box form. Tr. 30. A medical opinion may be rejected by the
20 ALJ if it is conclusory or inadequately supported. *Bray*, 554 F.3d at 1228;

1 *Thomas*, 278 F.3d at 957. Also, individual medical opinions are preferred over
2 check-box reports. *See Crane v. Shalala*, 76 F.3d 251, 253 (9th Cir. 1996);
3 *Murray v. Heckler*, 722 F.2d 499, 501 (9th Cir. 1983). An ALJ may permissibly
4 reject check-box reports that do not contain any explanation of the bases for their
5 conclusions. *Crane*, 76 F.3d at 253. However, if treatment notes are consistent
6 with the opinion, a check-box form may not automatically be rejected. *See*
7 *Garrison*, 759 F.3d at 1014 n.17; *see also Trevizo v. Berryhill*, 871 F.3d 664, 667
8 n.4 (9th Cir. 2017) (“[T]here is no authority that a ‘check-the-box’ form is any less
9 reliable than any other type of form”).

10 As the ALJ noted, Dr. Arnold’s testing showed “mild impairment” on Trails
11 A, but memory, insight, and judgment within normal limits; thus, Dr. Arnold’s
12 testing did not support the ALJ’s conclusion Plaintiff would have difficulty
13 adapting to change or being aware of hazards. As a one-time examining provider,
14 Dr. Arnold did not have an ongoing relationship with Plaintiff in order to lend
15 support to these opinions. Accordingly, without other explanation, the fact Dr.
16 Arnold’s opinion was cursory was a specific and legitimate reason to reject Dr.
17 Arnold’s opinion.

18 Next, the ALJ also rejected Dr. Arnold’s opinion was because, like Dr.
19 Rosekrans and Dr. Koenig’s opinions, it was not consistent with contemporaneous
20 treatment records of Dr. Brown. Tr. 30. It is well established that the ALJ is

1 responsible for resolving conflicts in the medical evidence. *Magallanes*, 881 F.2d
2 at 750. In March 2015, just six months prior to Dr. Arnold's September 2015
3 evaluation, Dr. Brown noted Plaintiff was "alert and cooperative," and had a
4 "normal mood and affect without evidence of depression and anxiety," "normal
5 attention span," and "good eye contact" with open conversation. Tr. 547. At her
6 visit with Dr. Brown in November 2015, Plaintiff had no psychiatric complaints,
7 Tr. 548, and in January 2016, Dr. Brown indicated Plaintiff's symptoms of
8 depression were "well controlled with medication." Tr. 557. Plaintiff does not
9 specifically challenge this reason as a basis for rejection of Dr. Arnold's opinion.
10 ECF No. 18 at 13.

11 The ALJ identified legitimate and specific reasons supported by substantial
12 evidence for according little weight to Dr. Arnold's opinion.

13 *4. William Brown, M.D. (Aug. 2016)*

14 The record also contains a letter dated August 29, 2016 from Plaintiff's
15 treating physician, Dr. Brown, who began treating her in December 2013. Tr. 585.
16 Dr. Brown indicates that he has treated Plaintiff for "severe" depression, anxiety,
17 and arthralgias. *Id.* He further states:

18 Plaintiff states that the above conditions prevent her from pursuing her
19 career as a cosmetologist for which she has been trained. She develops
20 severe fatigue after cutting the hair of 3-4 clients and is not able to put in a
full day's work because of the above symptoms.

1 *Id.*

2 The ALJ gave little weight to Dr. Brown’s “opinion,” while acknowledging
3 that Dr. Brown is a treating source. Tr. 31. However, the deference ordinarily
4 owed a treating physician does not apply where, as found by the ALJ, Dr. Brown’s
5 letter is not a medical opinion, but a recitation of Plaintiff’s subjective complaints.
6 Tr. 31. Moreover, the opinion that Plaintiff is unable to work as a cosmetologist is
7 not entitled to special significance, as it is a statement on an issue reserved to the
8 Commissioner. 20 C.F.R. § 404.1527 (d) (3) (“We will not give any special
9 significance to the source of an opinion on issues reserved to the Commissioner . . .
10 .”); 20 C.F.R. § 416.927(d).

11 Assuming the ALJ was required to consider and weight the statement, an
12 ALJ may reject a treating physician’s opinion that is premised primarily on
13 subjective complaints that the ALJ properly discounted. *Tonapetyan*, 242 F.3d at
14 1149. The ALJ found that Dr. Brown’s letter did not offer an opinion based upon
15 objective findings from his treatment notes, but reiterated what Plaintiff told him.
16 Tr. 31.

17 The ALJ further found that Dr. Brown’s treatment notes were internally
18 inconsistent even with Dr. Brown’s characterization of Plaintiff’s depression,
19 anxiety, and arthralgia as “severe.” Tr. 31. Dr. Brown’s treatment notes reflected
20 Plaintiff’s depression was “well controlled” with medication, Tr. 566, and as to

1 arthralgia, Plaintiff suffered from a rash and “intermittent swelling of the hands
2 and ankles,” which was improved with massage and application of warm water.
3 Tr. 561. The Court concludes the ALJ’s interpretation of the evidence is
4 reasonable and supported by substantial evidence. Accordingly, the ALJ also set
5 forth specific and legitimate reasons for assigning little weight to Dr. Brown’s
6 letter based upon Dr. Brown’s reliance upon Plaintiff’s unreliable self-report and
7 its inconsistency with his own treatment records.

8 *5. Reviewing Sources*

9 Finally, Plaintiff contends the ALJ erred by rejecting all of the treating and
10 examining physicians in the file, while relying upon the opinions of non-treating,
11 non-examining physicians Drs. Eather, Covell, and Griffin. ECF No. 18 at 14.
12 Plaintiff contends these opinions cannot by themselves justify the rejection of the
13 opinion of a treating physician. ECF No. 18 at 15 (citing *Lester*, 81 F.3d at 831).
14 The opinion of a non-examining expert “may constitute substantial evidence when
15 it is consistent with other independent evidence in the record.” *Tonapetyan*, 242
16 F.3d at 1149. Because the ALJ properly discounted the opinion evidence of Drs.
17 Rosekrans, Koenig, Arnold and Brown, the ALJ did not error in relying on the
18 opinion evidence from the reviewing consultants and testifying medical expert in
19 assessing Plaintiff’s RFC. The ALJ further found that this evidence was consistent
20

1 with the treatment record, including the treatment notes of Dr. Brown. In
2 combination, these findings amount to substantial evidence.

3 **C. Lay Evidence**

4 Plaintiff challenges the ALJ's treatment of statements provided by Jane
5 Lederer, Plaintiff's mother. ECF No. 18 at 15.

6 An ALJ must consider the statements of lay witnesses in determining
7 whether a claimant is disabled. *Stout*, 454 F.3d at 1053. Lay witness evidence
8 cannot establish the existence of medically determinable impairments, but lay
9 witness evidence is "competent evidence" as to "how an impairment affects [a
10 claimant's] ability to work." *Id.*; 20 C.F.R. § 416.913; *see also Dodrill v. Shalala*,
11 12 F.3d 915, 918-19 (9th Cir. 1993) ("[F]riends and family members in a position
12 to observe a claimant's symptoms and daily activities are competent to testify as to
13 her condition."). If lay witness statements are rejected, the ALJ "must give
14 reasons that are germane to each witness." *Nguyen*, 100 F.3d at 1467 (9th Cir.
15 1996) (citing *Dodrill*, 12 F.3d at 919).

16 The ALJ summarized Ms. Lederer's July 2014 Third Party Function Report,
17 Tr. 295-302, and August 2016 letter, Tr. 338. Tr. 31. Ms. Lederer indicated
18 Plaintiff's impairments affect her numerous ways both mentally and physically.
19 Tr. 300. For example, Ms. Lederer indicated Plaintiff has trouble concentrating
20 and needs encouragement to perform activities of daily living, Tr. 338; Plaintiff

1 hates change and misses school because of depression or anxiety, Tr. 299; Plaintiff
2 constantly talks and has trouble sleeping, Tr. 338; her anxiety and depression
3 “seem to rule her simple life,” Tr. 338; and her anxiety “kicks in” if she is around
4 more than one or two good friends or family, Tr. 338.

5 The ALJ accorded Ms. Lederer’s statements “little weight,” for the same
6 reasons he discounted Plaintiff’s symptom claims including the inconsistency with
7 the treatment record and lack of support in the medical record. Tr. 32. If the ALJ
8 gives germane reasons for rejecting testimony by one witness, the ALJ need only
9 point to those reasons when rejecting similar testimony by a different witness.

10 *Molina*, 674 F.3d at 1114; *see Valentine v. Comm’r Soc. Sec. Admin.*, 574 F.3d
11 685, 694 (9th Cir. 2009) (holding that because the ALJ provided clear and
12 convincing reasons for rejecting the claimant’s own subjective complaints, and
13 because the lay witness’s testimony was similar to such complaints, it follows that
14 the ALJ also gave germane reasons for rejecting the lay witness’s testimony).

15 Thus, the ALJ’s well-supported reasons for rejecting Plaintiff’s subjective
16 symptoms claims apply as well to Ms. Lederer’s statements. The Court concludes
17 the ALJ gave germane reasons for rejecting the lay witness statements. Moreover,
18 Plaintiff does not articulate any additional limitations identified by Ms. Lederer
19 that the ALJ should have adopted, ECF No. 18 at 15, accordingly any error in
20 consideration of Ms. Lederer’s statements was harmless. *Stout*, 454 F.3d at 1055

1 (error harmless where it is non-prejudicial to claimant or irrelevant to ALJ's
2 ultimate disability conclusion).

3 **D. Step Five**

4 Finally, Plaintiff's contends the ALJ erred at step five, because the ALJ
5 relied upon a RFC and hypothetical that failed to include all of Plaintiff's
6 limitations, including consistent absenteeism more than one day a month. ECF No.
7 18 at 18.

8 However, the ALJ's RFC need only include those limitations found credible
9 and supported by substantial evidence. *Bayliss*, 427 F.3d at 1217 ("The
10 hypothetical that the ALJ posed to the VE contained all of the limitations that the
11 ALJ found credible and supported by substantial evidence in the record."). The
12 hypothetical that ultimately serves as the basis for the ALJ's determination, i.e., the
13 hypothetical that is predicated on the ALJ's final RFC assessment, must account
14 for all of the limitations and restrictions of the particular claimant. *Bray*, 554 F.3d
15 1219, 1228 (9th Cir. 2009). "If an ALJ's hypothetical does not reflect all of the
16 claimant's limitations, then the expert's testimony has no evidentiary value to
17 support a finding that the claimant can perform jobs in the national economy." *Id.*
18 However, the ALJ "is free to accept or reject restrictions in a hypothetical question
19 that are not supported by substantial evidence." *Greger v. Barnhart*, 464 F.3d 968,
20 973 (9th Cir. 2006). A claimant fails to establish that a step five determination is

1 flawed by simply restating argument that the ALJ improperly discounted certain
2 evidence, when the record demonstrates the evidence was properly rejected.
3 *Stubbs–Danielson*, 539 F.3d at 1175–76.

4 Plaintiff contends the opinions of Dr. Koenig and Dr. Griffin, as well as
5 Plaintiff’s school records, demonstrate Plaintiff would have “attendance issues if
6 required to work,” a limitation which the RFC did not accommodate. ECF No. 18
7 at 18. Plaintiff contends her expected absences in excess of once per month make
8 her unable to sustain employment according to the vocational expert testimony. *Id.*
9 Plaintiff’s argument is based entirely on the assumption that the ALJ erred in
10 considering the medical opinion evidence and Plaintiff’s symptom claims. *See*
11 *Stubbs-Danielson v. Astrue*, 539 F.3d 1169, 1175 (9th Cir. 2008) (challenge to
12 ALJ’s step five findings was unavailing where it “simply restates [claimant’s]
13 argument that the ALJ’s RFC finding did not account for all her limitations”). For
14 reasons discussed throughout this decision, the ALJ’s adverse finding in regards to
15 Plaintiff’s subjective symptom claims and consideration of the medical opinion
16 evidence are legally sufficient and supported by substantial evidence. Thus, the
17 ALJ did not err in assessing the RFC and posed a hypothetical to the vocational
18 expert that incorporated all of the limitations in the ALJ’s RFC determination, to
19 which the expert responded that jobs within the national economy exist that
20 Plaintiff could perform. The ALJ properly relied upon this testimony to support

1 the step five determination. Therefore, the ALJ's step five determination that
2 Plaintiff was not disabled within the meaning of the Social Security Act was proper
3 and supported by substantial evidence.

4 **CONCLUSION**

5 After review, the Court finds that the ALJ's decision is supported by
6 substantial evidence and free of harmful error. **IT IS ORDERED:**

7 1. Plaintiff's Motion for Summary Judgment, **ECF No. 18**, is **DENIED**.

8 2. Defendant's Motion for Summary Judgment, **ECF No. 22**, is
9 **GRANTED**.

10 The District Court Executive is directed to file this Order, enter
11 **JUDGMENT FOR THE DEFENDANT**, provide copies to counsel, and **CLOSE**
12 **THE FILE**.

13 DATED September 26, 2018.

14 s/Mary K. Dimke
15 MARY K. DIMKE
16 UNITED STATES MAGISTRATE JUDGE
17
18
19
20